

CDDH-SCR(2024)R6 Addendum  
2 February 2024

STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)

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**DRAFTING GROUP ON HUMAN RIGHTS IN SITUATIONS OF CRISIS  
(CDDH-SCR)**

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**DRAFT RECOMMENDATION OF THE COMMITTEE OF MINISTERS ON THE  
EFFECTIVE PROTECTION OF HUMAN RIGHTS IN SITUATIONS OF CRISIS  
AND ITS DRAFT EXPLANATORY MEMORANDUM**

*as adopted by the Drafting Group at its 6th meeting  
(31 January – 2 February 2024)*

**(Draft) Recommendation CM/Rec(2024)xx  
of the Committee of Ministers to member States on the effective protection of human  
rights in situations of crisis**

(Adopted by the Committee of Ministers on xx 2024  
at the xx meeting of the Ministers' Deputies)

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The Committee of Ministers of the Council of Europe, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity among its member States by, *inter alia*, promoting common standards in the field of human rights;

Recalling member States' obligation to secure to all persons within their jurisdiction the rights and freedoms defined in the European Convention on Human Rights (ETS No. 5, the Convention) and its protocols, as applicable, and where relevant their obligations arising from the European Social Charter (ETS No. 35, the Charter) or the European Social Charter (revised) (ETS No. 163, the revised Charter), and other European and international human rights instruments;

Recognising the interconnectedness of human rights, democracy, and the rule of law and that all human rights are universal, indivisible, interdependent and inter-related and should be enjoyed by everyone without discrimination;

Acknowledging the heightened risk of human rights violations that may arise during situations of crisis, including as a result of the measures taken to address such situations, and stressing the need to adopt a human rights-based approach when responding to a crisis;

Acknowledging the disproportionate impact of crises on women and girls;

Expressing its concern at the impact on human rights of recent crises that have affected or continue to affect member States, such as the Covid-19 pandemic and Russian aggression against Ukraine;

Recalling the Athens Declaration by the Greek Chairmanship of the Committee of Ministers of 4 November 2020 entitled "Effectively responding to human rights, democracy and the essential importance of a war", with regard to human rights in times of crisis;

Taking into account the Guidelines of the Committee of Ministers on upholding equality and protecting against discrimination and hate during the Covid-19 pandemic and similar crises in the future, the Committee of Ministers' impact assessment of the measures taken by the State in situations of crisis, and the Report of the Steering Committee for Human Rights on derogations from European Convention on Human Rights in situations of crisis;

Reaffirming that derogation under Article 15 of the Convention is intended to be an exceptional procedure that is only permissible in time of war or other public emergency threatening the life

of the nation and that certain rights are non-derogable, even in the most challenging circumstances;

Recommends that the governments of member States:

1. ensure that human rights are respected and effectively protected during situations of crisis;
2. to this end, ensure that the principles set out in the appendix to this recommendation are implemented in practice and, as appropriate, in domestic law;
3. examine, within the Committee of Ministers, the implementation of this recommendation no later than five years after its adoption.

## **Appendix to Recommendation CM/Rec(2024)xx**

### **I. The framework of emergency powers**

1. Member States should, where possible, respond to a situation of crisis by using ordinary powers.
2. Member States should ensure that emergency powers are available to the executive for use only in exceptional circumstances, where the powers normally available would clearly be insufficient to enable an effective response to a situation of crisis, with the aim of overcoming the crisis and returning to a situation of normalcy.
3. Member States should ensure that the legal framework regulating emergency powers respects the overarching principle of the rule of law and ensures that the exercise of such powers is governed by the principles of legality, necessity, proportionality, temporariness, and foreseeability.
4. Member States should respect the role of local self-government, including, when possible, by consulting local authorities before transferring crisis-related responsibilities to them.

### **II. The use of emergency measures**

1. Member States should ensure that emergency measures are consistent with human rights obligations and respect the overarching principle of the rule of law. Any related restrictions should respect the principles of legality, necessity, proportionality, temporariness and foreseeability.
2. Member States should conduct human rights impact assessments, as appropriate in the circumstances, when considering whether and to what extent restrictive emergency measures should be adopted.

### **III. The principles of equality and non-discrimination**

1. Member States should apply the principles of equality and non-discrimination, including gender equality, throughout the response to a crisis.
2. Member States should ensure, as appropriate in the circumstances, the timely, meaningful, gender-balanced and inclusive consultation with and participation of representatives of minority groups and groups in a situation of vulnerability in the design, implementation and evaluation of emergency measures.
3. Member States should take appropriate measures to prevent and combat hate crimes as well as hate speech and violence during situations of crisis.

### **IV. The role of parliaments**

1. Member States should ensure that parliaments continue to exercise their powers of oversight during situations of crisis, both in relation to any decision by the executive to rely on emergency powers and the implementation of measures under these powers.

### **V. The role of the judicial system**

1. Member States should uphold the independence and integrity of the judicial system and ensure effective judicial oversight of the availability and exercise of emergency powers and the impact of emergency measures.

### **VI. The role of independent oversight mechanisms**

1. Member States should enable independent oversight mechanisms, such as Ombudspersons or National Human Rights Institutions, to continue to carry out their mandate and should refrain from any action that would hinder their activities.
2. Member States should ensure the timely, meaningful and inclusive consultation and participation of independent oversight mechanisms, such as Ombudspersons or National Human Rights Institutions, in crisis-related decision-making processes.

### **VII. The role of civil society**

1. Member States should support and protect the vital role of civil society organisations in promoting and defending human rights in situations of crisis.
2. Member States should ensure the timely, meaningful and inclusive consultation and participation of civil society in crisis-related decision-making processes.

### **VIII. Freedom of expression and the role of the media**

1. Member States should safeguard freedom of expression and ensure the availability of accurate and reliable information in situations of crisis.

2. Member States should exercise great caution when considering activating and applying measures which may affect media freedom.

#### **IX. Derogations under Article 15 of the European Convention on Human Rights**

1. Member States should respect the procedural and substantive requirements in relation to derogation under Article 15, as interpreted by the European Court of Human Rights.

2. Member States should clarify and, as appropriate, codify their national procedure in relation to derogation from the European Convention on Human Rights.

**(Draft) Explanatory Memorandum to the Recommendation CM/Rec(2024)xx of the Committee of Ministers on the effective protection of human rights in situations of crisis**

**A. Preliminary remarks**

1. In recent years, Council of Europe member States have faced a variety of situations of crisis (also referred to as “crises”) requiring challenges for the full and effective protection of human rights, such as the Covid-19 pandemic and Russia’s war of aggression, leading to having severe human rights consequences, such situations of crisis have led some member States to adopt emergency measures, in relation to some of which they lodged notifications of derogation from the European Convention on Human Rights (hereafter “Convention”). The present Recommendation stems from the acknowledgment by Council of Europe member States of the need to draw lessons from their experiences and to ensure that their responses to such crises respect essential human rights principles and standards.

2. For the purpose of the present Recommendation and Explanatory Memorandum, certain expressions should be understood as follows:

- “Situation of crisis” is understood as any situation at the level of the State that may involve alterations in the distribution of powers and functions at State level as well as the adoption of measures outside the regular legal framework, whether or not such measures are adopted under a declared state of emergency or similar legal regime. The Recommendation is intended to help member States to ensure that their responses to such crises respect essential human rights principles and standards. For ease of reading, the word “crisis” will be used instead of “situation of crisis”. The Recommendation covers crises in different forms and reach different levels of severity.
- “Emergency legal framework” refers to the adoption of measures outside the regular legal framework. Such a framework may be established at the level of the constitution and/ or ordinary law, may be contained in one or more legal instruments, and will generally regulate the conditions and procedure for the exercise of emergency powers and their scope.
- “Emergency powers” refers to the competences conferred by the emergency legal framework, including to adopt emergency measures.
- “Emergency measures” refers to measures adopted by the authorities of the State and empowered to take in response to a situation of crisis.

3. The present Recommendation takes into account both binding and non-binding legal standards. This includes those in the Convention, which is binding on all member States of the Council of Europe, and other treaties that are binding only on States that are party to them, such as the European Social Charter (ETS No. 35), the Revised European Social Charter (ETS No. 163), and other legal instruments such as Committee of Ministers’ guidelines.

Recommendation also draws on the jurisprudence of the European Court of Human Rights (hereafter “the Court”) Council of Europe expert bodies, notably developed the European Commission for Democracy through Law, and on the work of the Steering Committee for Human Rights (hereafter “the CDDH”) of crisis.

## B. The framework of emergency powers

*1.1. Member States should, where possible, respond to a situation of crisis by using ordinary powers.*

4. In a situation of crisis, member States should make every effort to address it using ordinary powers. Emergency powers should only be exercised when ordinary powers are deemed insufficient, as underlined in principle 1.2. of the Recommendation.<sup>1</sup>

*1.2. Member States should ensure that emergency powers are available to the executive for use only in exceptional circumstances, where the powers normally available would clearly be insufficient to enable an effective response to a situation of crisis, with the aim of overcoming the crisis and returning to a situation of normalcy.*

5. In a situation of crisis, the executive must have the means to act quickly and decisively to protect the public interest. The Covid-19 pandemic clearly demonstrated this, as States had to act fast to protect the lives of their populations, whilst ensuring that the response was rights-compliant in order to avoid knock-on effects on human rights.<sup>2</sup> In this regard, and considering that serious breaches of human rights may occur when emergency powers are exercised,<sup>3</sup> the decision to resort to them should be based on a finding that normal powers are inadequate to respond efficiently to the crisis, bearing in mind that applying ordinary powers in a situation of crisis is not a guarantee against abuse in itself.

6. The Recommendation underlines the utmost importance of not normalising states of emergency or similar legal regimes. Member States should therefore ensure that they exercise emergency powers with the sole aim of overcoming the exceptional situation that they are facing.<sup>4</sup> In this regard, member States should regularly review the necessity of continuing to exercise emergency powers and base their decision to extend or not the exercise of such powers on a presumption against doing so. If they decide to extend it, they should consider limiting to the extent possible the scope of the measures taken in this context.<sup>5</sup>

<sup>1</sup> See §5 of the present Explanatory Memorandum.

<sup>2</sup> Resolution 2329 (2020) *Lessons for the future from an effective and rights-based response to the Covid-19 pandemic*, Parliamentary Assembly of the Council of Europe, 26 June 2020, §6.

<sup>3</sup> CDL-AD(2016)006, Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), §51.

<sup>4</sup> CDL-AD(2020)014, Report on 'Respect for democracy, human rights and emergency: reflections', Eady through Law (Venice Commission) 19 June 2020, §5.

<sup>5</sup> Resolution 2209 (2018) *State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights*, Parliamentary Assembly of the Council of Europe, 28 April 2018, §19.4.

*1.3. Member States should ensure that the legal framework regulating emergency powers respects the overarching principle of the rule of law and ensures that the exercise of such powers is governed by the principles of legality, necessity, proportionality, temporariness, and predictability.*

7. Even in situations of crisis, the overarching principle of the rule of law must prevail.<sup>6</sup> State action must therefore be in accordance with and authorised by the law.<sup>7</sup> The principle of legality implies that the exercise of emergency powers should take place within a clear and sufficient legal framework. Such a framework should be in place before a crisis strikes and should strictly and clearly define the criteria for resorting to the use of emergency powers<sup>8</sup> as well as its implications in terms of, *inter alia*, the separation of powers and parliamentary and judicial oversight of government. The legal framework should ensure that the exercise of emergency powers remains proportionate to the aim of addressing the crisis.<sup>9</sup> In addition, the circumstances in which the legal framework may be applied, and the way in which emergency powers may be applied within that framework, should both be predictable. Member States are encouraged to avoid resorting to *de facto* emergency powers, in particular by issuing measures that fall outside the ordinary legal framework, without having officially declared a state of emergency or similar legal regime necessary to handle a crisis situation. In the absence of an existing emergency legal framework, States should assess the need for one by evaluating the adequacy of the ordinary legal framework for the adoption of emergency measures in crisis situations. When an emergency legal framework already exists, States should verify that it meets the requirements of clarity and sufficiency to allow the adoption of lawful measures.

8. In accordance with the principle of necessity, member States should ensure that emergency powers are only activated with the goal of overcoming the situation of crisis, and because ordinary powers have been deemed insufficient to achieve this.

9. Emergency powers should only be exercised temporarily: as soon as they are no longer necessary to address the exceptional situation at hand, emergency measures should be withdrawn and the ordinary legal framework should be restored. In any event, resorting to emergency powers should not have permanent effects, as they should only be exercised to respond to a situation of crisis, and not to introduce permanent changes.<sup>10</sup> The requirement of temporariness also involves the existence of a clear deadline for the termination of the exercise of emergency powers, and therefore the need for a decision on whether to extend it and for a strong rationale to support the decision. In this regard and with a view to preventing and reducing the potential for abuse, effective scrutiny, i.e. parliamentary control and/ or judicial review, of recourse to emergency powers, including their duration and any extension, should always be guaranteed.

<sup>6</sup> *Piškin* op. cit., §153. See also CDL-AD(2020)014, op. cit., §9.

<sup>7</sup> Rule of Law Checklist, adopted by the Venice Commission at its 106<sup>th</sup> Plenary Session (Venice, 11-12 March 2016), §44.

<sup>8</sup> Rule of Law Checklist, op. cit., §51.

<sup>9</sup> CDL-AD(2020)014, op. cit., §6.

<sup>10</sup> CDL-AD(2020)014, op. cit., §10-13.



*1.4. Member States should respect the role of local self-government, including, when possible, by consulting local authorities before transferring crisis-related responsibilities to them.*

10. Member States should recognise the important role that local authorities play in addressing a situation of crisis. Quite often, the first line of response lies at the local level where authorities are in direct contact with the population and well-placed to understand and address specific challenges posed either by the situation of crisis or the measures which need to be taken in response. In this regard, while responding to a situation of crisis may involve the introduction of uniform measures throughout the country, the role of local authorities should be preserved, and local autonomy should not be undermined.<sup>11</sup> Situations of crisis should not be used as a pretext for unjustified centralisation. The Recommendation therefore stresses the importance of central governments consulting local authorities throughout the crisis response process. To the extent possible, central governments should give such authorities sufficient time and appropriate means to contribute meaningfully to the design, evaluation, and review of crisis-response measures and should take such contributions into account. This is especially true when the ordinary distribution of competences is affected by the exercise of emergency powers. It is also true when new crisis-related responsibilities are transferred to local level, as evidenced during the Covid-19 pandemic, when such transfers were sometimes made precipitously, without appropriate consultation and matching financial resources<sup>12</sup>. In addition, the situation of crisis may impact at the local level, in such a way that it entails a need to address specific challenges, in particular in relation to the delivery of social services and economic activities. Consequently, member States should ensure that local authorities can continue to perform their role of providing indispensable public services and should adopt appropriate measures to support them in tackling the situation of crisis at hand, including by maintaining adequate funding and refraining from excessive supervision.<sup>13</sup>

### **C. The use of emergency measures**

*II.1. Member States should ensure that emergency measures are consistent with human rights obligations and respect the overarching principle of the rule of law. Any related restrictions should respect the principles of legality, necessity, proportionality, temporariness and foreseeability.*

11. Member States should explore every possibility for responding to a situation of crisis by using ordinary measures before concluding that emergency measures are required.<sup>14</sup> When imposing restrictions through emergency measures, member States should ensure that their action respects the principle of the rule of law, including in situations of crisis.<sup>15</sup> In addition, member States must comply with international human rights law obligations by which they are bound. Member States will note that there are human rights that are non-derogable, even in times of emergency.<sup>16</sup> The Convention provides for exceptions in relation to certain rights, such as the right not to be arbitrarily deprived of liberty under Article 5. In such cases, the

<sup>11</sup> Ensuring the respect of the European Charter of Local Self-Government in major crisis situations, Congress of local and Regional Authorities of the Council of Europe, 24 March 2021, Resolution 466 (2021), §3.

<sup>12</sup> Op. cit., §3.

<sup>13</sup> Op. cit, Resolution 453 (2021).

<sup>14</sup> Resolution 2209 (2018), Parliamentary Assembly of the Council of Europe, op. cit., §19.1.

<sup>15</sup> *P i ş k i n* vop. cit., §153; see also CDL-AD(2020)014, op. cit., §9.

<sup>16</sup> See §49 of the present Explanatory Memorandum.

Court has clearly established that the list of exceptions in a given article is exhaustive and that only a narrow interpretation of those exceptions is consistent with the aim of that article.<sup>17</sup> Member States should therefore ensure that measures affecting such rights respect the limits of the exceptions set in the relevant articles and relevant jurisprudence, including in the particular circumstances of a situation of crisis.<sup>18</sup>

12. A number of rights, known as “qualified rights”, such as family life under Article 8 of the Convention, may be limited in order to protect the rights of someone else or the wider public interest. Well-established standards to determine whether such interference could be permissible are set out in the case law of the Court.<sup>19</sup> The Court’s test remains the same even when the case relates to a situation of crisis, since it takes into account the context when assessing whether or not the member State violated protected rights.<sup>20</sup>

13. Member States should ensure that any restrictive measure respects the principle of legality, which involves fulfilling requirements of clarity and foreseeability,<sup>21</sup> including by ensuring that the law is adequately accessible and formulated with sufficient precision to enable the individuals to regulate their conduct.<sup>22</sup> Emergency measures should therefore have a clear legal basis, whether such measures are adopted under the ordinary legal framework or an exceptional legal framework. Member States should ensure such a basis exists and is clear and sufficient. Furthermore, the nature of adopted measures, i.e. whether they are compulsory or voluntary, should be made clear. In the event that the nature of the measures changes over time (i.e. become compulsory when they were initially not, or become voluntary when they were initially compulsory), member States should clearly and publicly communicate the measures’ change of status.

14. Emergency measures should be adopted in pursuit of a legitimate aim. Such measures should contain as few restrictions as possible, ensuring that restrictions imposed on human rights do not go further than necessary to achieve the legitimate aim and that the interference remains proportionate to the public interest that it is intended to pursue. Member States should also ensure that the measures are directly related to the situation of crisis and do not have effects that do not contribute to its resolution. They should be re-examined regularly by the authority that adopted them to determine whether they remain justified<sup>23</sup> or should be adapted in light of the evolving context of the crisis. Member States should bear in mind that the longer emergency measures are in place, the greater the impact they may have, which is relevant to proportionality considerations. Emergency measures should be temporary: they should be limited in time and not kept in place for longer than reasonably necessary<sup>24</sup> nor exceed the

<sup>17</sup> *Ladent v. Poland*, Application No. 11036/03, judgment of 18 March 2008, §45-46.

<sup>18</sup> See, regarding Article 5 of the Convention and in the context of the Covid-19 crisis, *Terheș v. Romania*, Application No. 49933/20, judgment of 13 April 2021, §36-37.

<sup>19</sup> *Stoll v. Switzerland*, Application No. 69698/01, Grand Chamber judgment of 10 December 2007, §46-48; Resolution 2338 (2020) *The impact of the Covid-19 pandemic on human rights and the rule of law*, Parliamentary Assembly of the Council of Europe, 13 October 2020, §12.1.

<sup>20</sup> See, in the context of the Covid-19 crisis, *Fenech v. Malta*, Application No. 19090/20, judgment of 1 March 2022, §96.

<sup>21</sup> See, in the context of a declared state of emergency (in relation to terrorism), *Pagerie v. France*, Application No. 24203/16, judgment of 19 January 2023, §187-191.

<sup>22</sup> *Sunday Times v. the United Kingdom*, Application No. 6538/74, judgment of 26 April 1979, §49.

<sup>23</sup> *Pagerie v. France*, op. cit., §177.

<sup>24</sup> *Fenech v. Malta*, op. cit., §139.

duration of the situation of crisis to which they are intended to respond.<sup>25</sup> Criteria to extend or withdraw the measures should be clearly defined and tailored to the situation, and the authority in charge of assessing them should be identified.

15. These principles have been applied in the case law of the Court, which, when assessing measures taken in the prison environment during the Covid-19 crisis, considered whether the authorities maintained their vigilance and adapted their protocols to the evolving situation.<sup>26</sup> The Court found that measures with a limited scope which were in force only for the time necessary to address the crisis were not disproportionate.<sup>27</sup>

*II.2. Member States should conduct human rights impact assessments, as appropriate in the circumstances, when considering whether and to what extent emergency measures should be adopted.*

16. A human rights impact assessment is a process for systematically identifying, analysing and addressing potential or actual adverse impacts on human rights of measures adopted by the State, even if the adverse impact does not involve interferences with human rights that could amount to violations.<sup>28</sup> It also aims to enhance transparency in public administration and accountability for negative impacts on human rights, and can be an effective tool in determining whether envisaged or adopted emergency measures warrant a derogation under Article 15 of the Convention.<sup>29</sup> Member States are therefore encouraged to conduct human rights impact assessments of the measures they consider adopting in situations of crisis. Such assessments should i adopt emergency measures, or to maintain or adapt those measures once adopted. Member States should also strive to mitigate potential adverse impacts identified through the assessment and to prevent or minimise harm by making reasonable efforts to compensate for the restrictions imposed.<sup>30</sup> In this regard, member States should also bear in mind that measures to compensate possible adverse effects may be needed after the crisis, to provide specific assistance to those negatively impacted in the longer term.

17. Human rights impact assessment processes should entail the meaningful and effective consultation and participation of civil society and national human rights institutions, unless it proves impossible for reasons of time, in which case it should be initiated at the earliest moment possible thereafter. Member States should provide civil society and national human rights institutions with relevant information in a timely and accessible manner, and as far as possible, with the opportunity to comment on and contribute to the findings of the assessment. In anticipation of potential situations of crisis, to facilitate this consultation process and avoid unnecessary delays, member States should establish in advance coordination mechanisms.

<sup>25</sup> Resolution 2337 (2020) *Democracies facing the Covid-19 pandemic*, Parliamentary Assembly of the Council of Europe, 13 October 2020, §4 and 8.

<sup>26</sup> *Fenech v. Malta*, op. cit., §135.

<sup>27</sup> See, in the context of the epidemic of foot-and-mouth disease, *Chagnon and Fournier v. France*, Applications Nos. 44174/06 and 44190/06, judgment of 15 July 2010, §57.

<sup>28</sup> See *Toolkit for the human rights impact assessment of measures taken by the State in situations of crisis*, adopted by the Committee of Ministers on xx 2024 at the xx meeting of the Ministers' Deputi

<sup>29</sup> See §46-51 of the present Explanatory Memorandum.

<sup>30</sup> *Constantin-Lucian Spînu v. Romania*, op. cit., §65-72.

18. National authorities involved in the preparation and application of emergency measures are encouraged to consult the Committee of Ministers Toolkit for human rights impact assessment of the measures taken by the State in situations of crisis.<sup>31</sup>

#### **D. The principles of equality and non-discrimination<sup>32</sup>**

*III.1. Member States should apply the principles of equality and non-discrimination, including gender equality, throughout the response to a crisis.*

19. The Covid-19 pandemic, as well as its social and economic effects, hit people belonging to certain groups particularly hard.<sup>33</sup> For example, the pandemic was especially harmful to older persons and had a disproportionately negative impact on their health and their human rights.<sup>34</sup> It exposed examples of a lack of equal treatment of older persons, such as in medical care<sup>35</sup> and exacerbated the risk faced by older persons of poverty and social exclusion, as well as social isolation which has a direct impact on their health status, including mental health.<sup>36</sup> Older persons should be protected from violence and abuse, even during a crisis, and appropriate health care and long-term quality care should be available and accessible to them,<sup>37</sup> including in nursing homes.<sup>38</sup> In this regard, it is crucial that member States ensure respect for the principle of the full enjoyment of all human rights and freedoms by older persons without any discrimination and for their inherent dignity, in accordance with Recommendation CM/Rec(2014)2 on the promotion of human rights of older persons, including in situations of crisis.

20. There is a critical need to counter inequality, including gender inequality, and discrimination and to promote diversity and inclusion during situations of crisis, as crises often lead to increased manifestations of racism, sexism, intolerance and prejudice against different groups.<sup>39</sup> Member States should continuously ensure that all individuals are equally protected under the law, keeping in mind that situations of crisis entail heightened risk for many people in situations of vulnerability, depending on their personal status or characteristics. In this regard, it is important to keep in mind that many persons may be exposed to exacerbated and potentially cumulative and interacting forms of discrimination due to the intersection of race,<sup>40</sup>

<sup>31</sup> *Toolkit for the human rights impact assessment of measures taken by the State in situations of crisis*, op. cit.

<sup>32</sup> On this topic, reference is made to the Guidelines of the Committee of Ministers of the Council of Europe on upholding equality and protecting against discrimination and hate during the Covid-19 pandemic and similar crises in the future, 5 May 2021.

<sup>33</sup> Explanatory Memorandum to the Guidelines of the Committee of Ministers of the Council of Europe on upholding equality and protecting against discrimination and hate during the Covid-19 pandemic and similar crises in the future, §1; Statement by the Bureau of the European Commission against Racism and Intolerance (ECRI) on the impact of the Covid-19 pandemic and related government responses on groups of concern to ECRI, 19 May 2020; Annual Report on ECRI's activities 2020, 3 December 2020, [see in particular §7](#).

<sup>34</sup> Older persons need more support than ever in the age of the Covid-19 pandemic, Statement by the Council of Europe Commissioner for Human Rights, 20 March 2020.

<sup>35</sup> Statement on COVID-19 and social rights, European Committee of Social Rights, 24 March 2021.

<sup>36</sup> Older persons need more support than ever in the age of the Covid-19 pandemic, Statement by the Council of Europe Commissioner for Human Rights, 20 March 2020.

<sup>37</sup> See Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons.

<sup>38</sup> Statement on COVID-19 and social rights, European Committee of Social Rights, 24 March 2021.

<sup>39</sup> See, in particular, Study on preventing and combating hate speech in times of crisis, Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI), November 2023; and Resolution 2339 (2020), Parliamentary Assembly of the Council of Europe, op. cit., §8.

<sup>40</sup> Since all human beings belong to the same species, the Committee of Ministers rejects, as does the European Commission against Racism and Intolerance (ECRI), theories

national, ethnic or social origin, migration status, disability, age, religion or belief, sex, gender, sexual orientation, gender identity, gender expression, sex characteristics, and other grounds.<sup>41</sup>

21. Emergency measures must not be discriminatory, in accordance with Article 14 of the Convention and, where applicable, Protocol No. 12 to the Convention.<sup>42</sup> In this regard, member States should bear in mind, even when responding to situations of crisis, that some particular and personal circumstances or characteristics should be accommodated through special arrangements.<sup>43</sup>

22. Member States should assess on a regular basis, by gathering data that is disaggregated, including on grounds of sex and age, the impact of the emergency measures adopted in response to the crisis on individuals within their populations. They should ensure that the measures are and remain in accordance with human rights standards regarding equality, including gender equality, and non-discrimination. They should further ensure that these measures do not disproportionately affect some groups of individuals, resulting in a difference in treatment that could amount to discrimination, even if there is no discriminatory intent. In conducting such assessments, member States should involve specialists in human rights, in particular in the fields of equality and non-discrimination, and consult equality bodies and civil society partners.<sup>44</sup> Member States should also take into account the findings of parliaments, equality bodies, Ombudspersons, and national human rights institutions that conduct independent research in times of crisis. Member States could rely on current and pre-existing data gathered and analysis conducted by non-governmental organisations, national human rights institutions or international organisations, in addition to that of state agencies. Such assessments should then be incorporated into the ongoing process of human rights impact assessment, insofar as possible in consultation with civil society and national human rights institutions, so as to allow the response to the crisis to be adapted, with a view to preventing, eliminating or, in the last resort, compensating possible discriminatory effects and enhancing possible positive effects.

23. Member States should also adopt a gender-sensitive approach when assessing the impact of situations of crisis and the measures taken in response to them. Women and girls, in all their diversity,<sup>45</sup> can be subject to multiple and intersecting forms of discrimination and may face sexism combined with other norms of behaviour which are discriminatory, hateful or harmful.<sup>46</sup> During the Covid-19 pandemic, for example, the drastic increase in cases of domestic violence was further aggravated by a sharp reduction in access to support and protection services for those who needed them. In a situation of crisis, member States should

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in this document, the term "race" is used in and erroneously to ensure perceived as "belonging to another race" are not excluded legislation and policies.

<sup>41</sup> Annual Report on ECRI's activities covering 2020, European period for Commission against Racism and Intolerance (ECRI), see in particular §67.

<sup>42</sup> See, in the context of a notified derogation (in relation to a terrorist threat), *A. & others v. United Kingdom*, Application No. 3455/05, Grand Chamber judgment of 19 February 2009, §190.

<sup>43</sup> See, in the context of the Covid-19 crisis, *Q and R v. Slovenia*, Application No. 19938/20, judgment of 8 February 2022, §80.

<sup>44</sup> Statement by the Bureau of the European Commission against Racism and Intolerance (ECRI) on the impact of the Covid-19 pandemic and related government responses on groups of concern to ECRI, 19 May 2020.

<sup>45</sup> The expression "in all the commitment do leave no one behind and to achieve a gender equal Europe for everyone, regardless of their sex, gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation, gender identity, gender expression or sex characteristics.

<sup>46</sup> Recommendation CM/Rec(2019)1 of the Committee of Ministers on preventing and combating sexism.

continue and adapt their efforts to prevent, protect against and prosecute domestic violence and gender-based violence, including by maintaining support services for victims.<sup>47</sup> In this regard, member States that have not yet done so are encouraged to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210, Istanbul Convention) and, in the meantime, to implement Recommendation Rec(2002)5 of the Committee of Ministers on the Protection of Women against Violence. In the same way, diverse situations of war, natural disasters and economic crises have a differential and often more negative effect on women and girls, due to gender norms and their often more precarious economic and social situation. Member States are therefore encouraged to adopt a gender-sensitive approach to the prevention and mitigation of situations of crisis, taking into account the sometimes differing needs of women and men in all their diversity.

24. It is recognised that crises exacerbate inequalities, including gender inequalities, and social disparities<sup>48</sup> and make them more acute and visible than in ordinary times. Member States should strive to ensure continuity in the functioning of their social services so that their populations have access to, at least, the most minimal services, such as health services, including reproductive health services, and protection against violence and discrimination. Member States should also make efforts to tackle and eliminate structural inequalities and disadvantages to increase their resilience to and preparedness for future crises.

*III.2. Member States should ensure, as appropriate in the circumstances, the timely, meaningful, gender-balanced and inclusive consultation with and participation of representatives of minority groups and groups in a situation of vulnerability in the design, implementation and evaluation of emergency measures.*

25. Some parts of the population are under-represented in decision-making, and particularly when it comes to crisis management. When faced with a situation of crisis, member States should consider the different and possibly disproportionate impact that such a situation and the measures taken in response to it may have on different individuals and groups depending on their personal status or characteristics, such as children, elderly persons, persons with disabilities, persons belonging to national minorities, women and girls, and LGBTI persons. Such persons and groups may, as a result, be more marginalised and more exposed to the effects of the crisis. Member States should bear in mind that vulnerability may result from an individual's situation and personal crisis that is unfolding. Member States should therefore identify, in the particular context that they are in, which groups are most likely to face greater difficulties than most segments of the population and find themselves in a situation of vulnerability, in order to provide them with appropriate support and mitigate the adverse impacts of the crisis on them.

<sup>47</sup> See of Guidelines of the Committee of Ministers of the Council of Europe on upholding equality and protecting against discrimination and hate during the Covid-19 pandemic and similar crises in the future, 5 May 2021, §34: "During the pandemic, the number of cases of domestic violence increased sharply, including towards women, girls and more generally children belonging to vulnerable groups. The information received from several member States also showed that many LGBTI persons had to return to their families and became exposed to hostile environments. Other forms of violence against women and LGBTI persons also increased, in particular on the internet".

<sup>48</sup> Statement on COVID-19 and social rights, European Committee of Social Rights, 24 March 2021; Statement on the COVID-19 pandemic and national minorities, Advisory Committee on the Framework Convention for the Protection of National Minorities, 28 May 2020; Statement by the Group of Experts on Action against Trafficking in Human Beings in an emergency, the rights and safety of trafficking victims must be respected and protected', 2 April 2020.

26. In order to better understand the situation of such individuals and groups, member States should involve their representatives in the elaboration of crisis-response measures, without hindering the ability of the government to act swiftly in a crisis situation. Member States should continue to engage in active dialogue with existing structures representing individuals and groups that may find themselves in a situation of vulnerability in order to accurately assess their situation and needs, including by ensuring that they are provided with relevant information in a timely and accessible manner. Groups identified as being in a situation of vulnerability, as well as women, may encounter particular difficulties in engaging in crises-related decision-making processes. To facilitate their effective participation, member States should consider establishing consultation or feedback mechanisms ahead of a crisis, as part of their crisis management structures, which they could then use when needed.

*III.3. Member States should take appropriate measures to prevent and combat cases of hate crime as well as hate speech and violence in situations of crisis.*

27. Situations of crisis often trigger manifestations of hate speech, which may incite acts of discrimination and violence, including hate crimes.<sup>49</sup> This was apparent during the Covid-19 pandemic, when hate speech, including online abuse, rose significantly and led to acts of stigmatisation of various groups of individuals, such as foreigners and Roma and Travellers, who were accused of spreading the virus.<sup>50</sup> Member States should therefore take appropriate steps to prevent and combat hate speech and hate crimes in situations of crisis, which may include adopting relevant legislation in advance, enhancing the existing legal framework to enable an effective response in times of crisis, and conducting awareness-raising campaigns. In this regard, member States are encouraged to implement, in general and during a crisis, in particular Committee of Ministers Recommendations CM/Rec(2022)16 on combating hate speech and CM/Rec(2019)1 on preventing and combating sexism, and European Commission against Racism and Intolerance (ECRI) Recommendation No. 15 on combating hate speech. In doing so, member States should be mindful of the risks of misuse of restrictions on hate speech, in particular for the purpose of silencing dissent and opposition, and of unlawful interference with the right to freedom of expression.<sup>51</sup> Disproportionate restrictions on the freedom of expression may hamper efforts to counter the sort of disinformation that contributes to creating and spreading hate speech. Member States should further ensure that their legislation addressing hate speech covers online as well as offline hate speech, and that it covers all potential targets of hate speech that are included in CM/Rec(2022)16 on combating hate speech.

28. In situations of crisis, the population is likely to consider public officials to be reliable sources of information. In this regard, member States should acknowledge the particular responsibility of public officials not only to avoid engaging in hate speech but also to condemn

<sup>49</sup> Study on preventing and combating hate speech in times of crisis, op. cit., see in particular §32; Statement of the European Commission against Racism and Intolerance (ECRI) on preventing and combating ultra-nationalistic and racist hate speech and violence in relation to confrontations and unresolved conflicts in Europe, adopted by ECRI at its 85th plenary meeting, 30-31 March 2021.

<sup>50</sup> Op. cit., p.14-16; Statement by the Bureau of the European Commission against Racism and Intolerance (ECRI) on the impact of the Covid-19 pandemic and related government responses on groups of concern to ECRI, 19 May 2020; Annual Report on the Rule of Law from 1 January to 31 December 2020, see in particular §3.

<sup>51</sup> Statement of the European Commission against Racism and Intolerance (ECRI) on the rise of antisemitism in Europe as a result of the current Miplenary meeting 5-8 December 2023, see in particular §3. ( a c t )

it firmly and promptly and to foster a culture of tolerance.<sup>52</sup> They should further consider training public officials to recognise and avoid hate speech in their own discourse.<sup>53</sup>

### E. The role of parliaments

*IV.1. Member States should ensure that parliaments continue to exercise their powers of oversight during situations of crisis, both in relation to any decision by the executive to rely on emergency powers and the implementation of measures under these powers.*

29. Member States' governments must be able to a crisis. Such a response may, however, involve a greater risk of violation of protected rights and freedoms. Member States should ensure that parliaments continue to function in situations of crisis and, in particular, that they are able effectively to scrutinise emergency responses. Parliaments should supervise, in a timely manner, the use of emergency powers, including the declaration, any prolongation, and the termination of a state of emergency or a similar exceptional legal regime. Parliaments should also be able, where relevant, to modify and/ or annul the decisions of the executive, including by ensuring that emergency measures issued by the executive do not remain in force beyond the duration of the situation of crisis unless confirmed by parliament under the ordinary legislative procedure.

30. During the Covid-19 pandemic, the absence of procedural rules applicable in emergency situations prevented some parliaments from exercising their role, for example due to the absence of provisions authorising remote, including online, decision-making. The laws and by-laws prescribing the procedures and methods of work of parliaments should therefore enable them to continue their work during a state of emergency, to avoid paralysis or functioning on an *ad hoc* basis of uncertain legality.

### F. The role of the judicial system

*V.1. Member States should uphold the independence and integrity of the judicial system and ensure effective judicial oversight of the exercise of emergency powers and the impact of emergency measures.*

31. Some types of crisis may have a severe impact on the everyday functioning of the judicial system. Member States should therefore ensure that the independence and integrity of the judicial system and the judiciary are respected at all times and that the functioning of the judicial system is not restricted unless absolutely necessary and on the basis of clear legal provisions. The judicial system plays a crucial role in the control of the exercise of the executive's prerogatives<sup>54</sup> and therefore member States should s o f c guarantee the possibility of effective judicial review of the legality and validity of the availability and exercise of emergency powers, including the conditions of their activation. The Court has recognised that it would be inconsistent with the rule of law in a democratic society not to submit the implementation of emergency measures to effective judicial review if their legal basis does not contain any clear or explicit wording excluding the possibility of judicial

<sup>52</sup> CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech, §28-29.

<sup>53</sup> Op. cit., § 50.

<sup>54</sup> CDL-AD(2020)014, op. cit., §85.



supervision.<sup>55</sup> Judicial control of the activation of emergency powers may be limited to the control of its procedural aspects. However, the substantive grounds of such activation should also be subject to judicial review in cases where the measures adopted under emergency powers involve derogations from human rights.<sup>56</sup>

32. Furthermore, the legal obligation of member States to provide effective remedies remains applicable in situations of crisis. Courts should therefore be able to control the legality, necessity, and proportionality of the emergency measures, and ensure that they do not infringe non-derogable rights.<sup>57</sup> More generally, member States should ensure the existence of effective remedies when a breach of the Convention or domestic law is found as a result of the measures taken in situations of crisis. To be effective, a remedy must be available and sufficient, and it must allow the competent authority to deal with the substance of the complaint and to grant appropriate relief.

33. In addition, while restrictions necessitated by a situation of crisis could understandably have an adverse impact on the processing of cases before the domestic courts,<sup>58</sup> member States must still ensure that such disruptions do not lead to violations of the right to a fair trial.<sup>59</sup> This includes ensuring that the very essence of the right of access to a court is not impaired<sup>60</sup> as well as considering the importance of the subject-matter of the proceedings and, where appropriate, demonstrating special diligence to hear the case within a reasonable time.<sup>61</sup> In this connection, and to further secure access to justice, member States should also continue, as appropriate, to provide legal aid services, information and support for individuals whose rights may have been violated or are at risk of violation in situations of crisis.

## G. The role of independent oversight mechanisms

*VI.1. Member States should enable independent oversight mechanisms, such as Ombudspersons or National Human Rights Institutions, to continue to carry out their mandate and should refrain from any action that would hinder their activities.*

34. In a situation of crisis, monitoring of the crisis management process by independent oversight mechanisms, such as Ombudspersons, national human rights institutions, and equality bodies, is an essential safeguard for individual rights, complementary to the oversight role of parliaments and jurisdictions,<sup>62</sup> as was evidenced during the Covid-19 pandemic.<sup>63</sup> Independent oversight mechanisms can also assist with the dissemination of information, provide guidance, recommendations and advice to governments, draw attention to problematic issues and then prompt action by national authorities, assess policies in light of human rights standards, conduct studies on the medium- and long-term impact of the crisis

<sup>55</sup> See, in the context of a notified derogation (in relation to an attempted military coup and other terrorist acts), *Piskin v. Azerbaijan*, Application No. 33399/18, judgment of 15 December 2020, §153.

<sup>56</sup> CDL-AD(2020)014, op. cit., §86.

<sup>57</sup> CDL-AD(2020)014, op. cit., §87.

<sup>58</sup> *Q and R v. Slovenia*, op. cit., §80.

<sup>59</sup> Resolution 2338 (2020), Parliamentary Assembly of the Council of Europe, op. cit., §12.11.

<sup>60</sup> *Zubac v. Croatia*, Application No. 40160/12, Grand Chamber judgment of 5 April 2018, §76 and 78.

<sup>61</sup> *Q and R v. Slovenia*, op. cit., §82.

<sup>62</sup> CDL-AD(2020)014, op. cit., §90.

<sup>63</sup> Study on the analysis of the anti-discrimination, diversity and inclusion dimensions in Council of Europe member States", *Steering Committee on Diversity and Inclusion (CDADI)*, November 2020, p. 13-15.

on human rights and the rule of law, draft research-based documents to support response, and assist with capacity-building for state officials. Member States that have not yet done so are strongly encouraged to establish national human rights institutions, in full compliance with the Paris Principles<sup>64</sup> and taking into account Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions, or comparable institutions, such as Ombudspersons.

35. Member States should ensure that independent oversight mechanisms are provided with appropriate conditions to continue and, where necessary, to intensify their work, including by allocating the necessary competences, resources and legal guarantees to enable them to function independently.<sup>65</sup> Moreover, Member States should ensure that independent oversight mechanisms can effectively carry out their monitoring functions during the crisis by providing them with direct and timely access to information related to emergency measures. Member States should refrain from any actions that would negatively influence the work of such mechanisms or endanger their operational stability beyond legitimate interferences that may be required to respond to the crisis.

*VI.2. Member States should ensure the timely, meaningful and inclusive consultation and participation of independent oversight mechanisms, such as Ombudspersons or National Human Rights Institutions, in crisis-related decision-making processes.*

36. Considering the expertise of such mechanisms in relation to international human rights standards, the consultation and participation of independent oversight mechanisms supports the integration of a human rights perspective into the national response to the crisis. In addition, it contributes to enhancing transparency and accountability throughout the crisis management process. Member States should include such mechanisms in the various decision-making steps and in the drafting, adoption and re-evaluation of crisis-related policies, legislation, strategies and action plans.

37. For the consultation and participation process to be meaningful, member States should guarantee that independent oversight mechanisms have genuine opportunities to engage with public authorities, and that they are provided with sufficient time to make substantive contributions, without hindering the action of the government in its response to the crisis. Member states are encouraged to address expressly recommendations made by independent oversight mechanisms, including by giving reasons, when requested, should they not implement those recommendations. Consultation and participation should continue during the post-crisis recovery period: independent oversight mechanisms play an essential role by conducting independent reviews, identifying lessons learned, and drawing attention to lasting effects of the measures. Once a crisis is over, member States are encouraged to commission an independent overarching review of the response to the situation of crisis, including its impact on human rights over time and the effectiveness of the measures taken, in order to strengthen respect for human rights in the management of future crises.

<sup>64</sup> Principles relating to the status of national institutions, adopted by the United Nations General Assembly on 20 December 1993 in its Resolution 48/134 on national human rights institutions for the promotion and protection of human rights.

<sup>65</sup> Resolution 2339 (2020), Parliamentary Assembly of the Council of Europe, op. cit., §13.3.4.

## H. The role of civil society

*VII.1. Member States should support and protect the vital role of civil society organisations in promoting and defending human rights in situations of crisis.*

38. The Covid-19 pandemic highlighted the importance of the crucial and multifaceted role of civil society, including non-governmental organisations and human rights defenders, in situations of crisis. Civil society can notably contribute to the front-line response, raise alerts about possible risks, disseminate information about the crisis and the national response to it, and monitor the human rights consequences of the crisis and of the measures taken in response. Member States should therefore ensure that civil society organisations are recognised as key actors that can make a specific and useful contribution to crisis management. In order to protect this essential role, member States should consider providing civil society with necessary assistance and financial support during crises, which could include funding and tax exemptions.<sup>66</sup>

39. Moreover, when adopting emergency measures, member States should assess their impact on the functioning of civil society and ensure that they will not endanger the operational stability of civil society organisations beyond restrictions permitted by the Convention or legitimate interferences that may be required to respond to the crisis,<sup>67</sup> nor undercut the ability of civil society organisations to promote and defend human rights during the crisis. Member States should especially strive to maintain an enabling environment respectful of freedom of association, freedom of assembly, freedom of expression and freedom of information.<sup>68</sup>

*VII.2. Member States should, as appropriate in the circumstances, ensure the timely, meaningful and inclusive consultation and participation of civil society in crisis-related decision-making processes.*

40. The restrictive measures taken in response to the Covid-19 pandemic significantly affected the situation of civil society in all Council of Europe member States, including by negatively impacting the functioning of civil society organisations.<sup>69</sup> Consultation and participation of civil society, however, contributes to enhancing public acceptance of the measures, which in turn strengthens their legitimacy and is likely to increase public adherence to them. Member States should encourage and facilitate the timely, meaningful and inclusive consultation and participation of civil society, in order to guarantee better representation of the full diversity of society, ensure that the various interests of individuals are heard in decision-making processes related to emergency measures, and mitigate the risks of fragmented approaches in the response to the crisis.

41. Member States should ensure that civil society organisations are adequately consulted on laws, policies and practices that concern them as well as, to the extent possible, the

<sup>66</sup> Guidelines of the Committee of Ministers of the Council of Europe on upholding equality and protecting against discrimination and hate during the Covid-19 pandemic and similar crises in the future, §8; Resolution 2471 (2022) *The impact of the Covid-19 restrictions on civil society space and activities*, Parliamentary Assembly of the Council of Europe, 25 November 2022, §9.7-9.8.

<sup>67</sup> Safeguarding human rights in times of economic crisis, Issue Paper, Council of Europe Commissioner for Human Rights, November 2013, p. 47; Resolution 2471 (2022), Parliamentary Assembly of the Council of Europe, op. cit., §9.4.

<sup>68</sup> Resolution 2209 (2018), Parliamentary Assembly of the Council of Europe, op. cit., §19.6.

<sup>69</sup> Resolution 2471 (2022), Parliamentary Assembly of the Council of Europe, op. cit., §4-5.

handling of the crisis.<sup>70</sup> For such processes to be effective, member States should ensure that civil society organisations can make substantive inputs by providing adequate information in a timely manner<sup>71</sup> and genuine opportunities for discussion between public authorities and civil society. To deal with time constraints, member States should consider establishing coordination mechanisms with relevant civil society interlocutors in advance of any crisis that can be effectively and quickly mobilised in a situation of crisis. This may involve identifying relevant interlocutors and establishing relationships with civil society partners. While consultative processes should not hinder the action of the government in its response to the crisis, consultation and participation of civil society should, to the extent possible, cover the various decision-making steps and the drafting, adoption and re-evaluation of policies, legislation, strategies and action plans. In the aftermath of a crisis, member States should involve civil society in processes aiming to develop good practices and identify lessons learned.

### I. Freedom of expression and the role of media

*V I I I . 1 . M e m b e r S t a t e s s h o u l d s a f e g u a r d f r e e d o m o f e x p r e s s i o n a n d t h e o n d e r l i m i t a t i o n s s a l l o w e d b y a r t i c l e 1 0 o f t h e C o n v e n t i o n . M e m b e r S t a t e s s h o u l d e n s u r e t h a t i n d i v i d u a l s h a v e a c c e s s t o a c c u r a t e a n d r e l i a b l e i n f o r m a t i o n i n s i t u a t i o n s o f c r i s i s .*

42. Freedom of expression is fundamental in a democratic society.<sup>72</sup> In times of crisis, access to accurate and reliable information is essential to guarantee transparency and encourage public debate and engagement. Member States should therefore not restrict freedom of expression and the only limitations allowed by article 10 of the Convention. Member States should further ensure that individuals have access to accurate and reliable information about the crisis and emergency measures. In this regard, they should guarantee that up-to-date information is available to everyone, including to persons in a situation of vulnerability or belonging to minority groups, to persons with specific needs and to persons with no internet access. Member States should also continue to protect whistle-blowers against retaliation of any form, so as to ensure that individuals feel safe to raise public interest concerns, including with regard to the management of the crisis. Member States are encouraged to apply the principles set out in Committee of Ministers Recommendation CM/Rec(2014)7 on the protection of whistleblowers.

43. During a crisis, disinformation and misinformation can hinder public trust in the government, spread panic, and lead to manifestations of discrimination and hate. Member States should adopt appropriate measures to combat disinformation and misinformation, including by ensuring access to and providing trusted sources of information, raising awareness through information campaigns, and working with online platforms and the media to prevent disinformation and misinformation. Criminalisation of disinformation, if used at all, should be confined to the most harmful occurrences, given its potential chilling effect on public discourse more generally and the impact of this on exercise of freedom of expression. During the Covid-19 pandemic, combating disinformation was sometimes used as a pretext to introduce disproportionate restrictions on media freedom.<sup>73</sup> Member States should ensure that

<sup>70</sup> Resolution 2471 (2022), Parliamentary Assembly of the Council of Europe, op. cit., §9.9.

<sup>71</sup> Resolution 2471 (2022), Parliamentary Assembly of the Council of Europe, op. cit., §9.10.

<sup>72</sup> *Manole and others v. Moldova*, Application No. 13936/02, 17 September 2009, §96.

<sup>73</sup> Press freedom must not be undermined by measures to counter disinformation about COVID-19, Statement by the Council of Europe Commissioner for Human Rights, 3 April 2020.

measures to combat disinformation do not prevent journalists from carrying out their work or impose undue restrictions on freedom of expression and media freedom.<sup>74</sup>

44. Member States should continue to secure the right to access official documents in situations of crisis and, to this end, ensure that any limitation be set down precisely in law and be necessary and proportionate, and that individuals have access to a review procedure when a request for an official document is denied. In this regard, member States are encouraged to apply the principles set out in Committee of Ministers Recommendation Rec(2002)2 on access to official documents, and those that have not yet done so are encouraged to ratify the Council of Europe Convention on Access to Official Documents (CETS No. 205, the Tromsø Convention).

*VIII.2. Member States should exercise great caution when considering activating and applying measures which may affect media freedom.*

45. Journalists play a key role as an oversight mechanism, as well as by providing timely, accurate and reliable information to the public in situations of crisis and scrutinizing the national response. They should be able to speak freely and to report on the crisis management process, but also to be critical of a State's sanctions or prosecutions. Their right to transmit information on issues of general interest is protected by article 10 of the Convention. However, the protection afforded to journalists by Article 10 is subject to the proviso that they act in good faith and on an accurate factual basis and provide "reliable and precise" information.<sup>75</sup> Moreover, the safety and working conditions of journalists may be aggravated in a crisis context, as happened during the Covid-19 pandemic, when some journalists were the victims of reprisals for their reporting on the crisis.<sup>76</sup> Member States should guarantee media freedom, should protect the safety of journalists,<sup>77</sup> and should maintain a favorable environment for journalists to enable reporting in crisis situations, including, when relevant, by allowing them access to crisis areas,<sup>78</sup> and by providing them with information and engaging with them through press conferences.<sup>79</sup> Member States should therefore refrain from adopting measures that would prevent media and professional journalists from carrying out their work. When considering whether to activate and apply measures which affect media freedom, member States should apply relevant human rights standards, including the principles of legality, necessity and proportionality.<sup>80</sup> They should ensure that these measures are exceptional and do not result in censorship, whether deliberate or unintentional.

<sup>74</sup> Resolution 2338 (2020), Parliamentary Assembly of the Council of Europe, op. cit., §3.

<sup>75</sup> *Fressoz and Roire v. France*, Application No. 29183/95, Grand Chamber judgment of 21 January 1999, §54.

<sup>76</sup> State of the rule of law in Europe, Reports from National Human Rights Institutions, European Network of National Human Rights Institutions, June 2021, p. 37-38.

<sup>77</sup> Resolution 2338 (2020), Parliamentary Assembly of the Council of Europe, op. cit., §12.6.

<sup>78</sup> Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, 26 September 2007, §8.

<sup>79</sup> SG/Inf(2020)19, The impact of the sanitary crisis on freedom of expression and media freedom, 7 July 2020, p. 3.

<sup>80</sup> CDL-AD(2020)018, Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights, European Commission for Democracy through Law (Venice Commission), 8 October 2020, §100.

## J. Derogations under Article 15 of the European Convention on Human Rights

*IX.1. Member States should respect the procedural and substantive requirements in relation to any derogation under Article 15, as interpreted by the European Court of Human Rights.*

46. The Committee of Ministers has recalled that “ *t h e p o s s i b i l i t y f o r S t a t e s t o d e r o g a t e f r o m t h e i r o b l i g a t i o n s u n d e r t h e C o n v e n t i o n i s a n i m p o r t a n t f e a t u r e o f t h e s y s t e m p e r m i t t i n g t h e c o n t i n u e d a p p l i c a t i o n o f t h e C o n v e n t i o n a n d i t s s u p e r v i s o r y m a c h i n e r y e v e n i n t h e t i m e s o f c r i s i s*.”<sup>81</sup> In this regard, member States should bear in mind that the fundamental principle of the rule of law must prevail, even in situations of crisis,<sup>82</sup> and that a derogation, even if it may be justified by the circumstances surrounding it, does not have the effect of dispensing with the obligation of a State to respect the principle of the rule of law and its attendant guarantees.<sup>83</sup> Member States should therefore always take a very cautious approach when considering interference with protected rights beyond the scope of restrictions permitted under the Convention,<sup>84</sup> carefully assess whether a derogation is required, and, if so, notify the derogation in accordance with their national and international obligations. In addition, member States should not invoke their obligation to protect non-derogable rights under the Convention and its protocols at all times as justification for suspending or restricting other protected rights and freedoms.

47. In relation to procedural requirements, Article 15(3), as interpreted by the Court, requires member States to keep the Secretary General of the Council of Europe fully informed of the measures which they have taken and the reasons therefore, without any unavoidable delay. This means that an official and public notice of derogation is required, which implies a requirement for States to provide copies of all measures and an explanation of their purpose, together with sufficient information to enable the other High Contracting Parties to appreciate the nature and extent of the derogations involved. It also implies that additional notifications are required when extending the duration of the derogation, or when new derogating measures are adopted, or there is a change in the territorial scope of the measures. In addition, member States should inform the Secretary General when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

48. In order to assist the Council of Europe, the Court and other member States, member States are invited to consider indicating in the derogation notice which Convention rights are affected by the relevant measures. While inconsistent, a tendency to do so has emerged. During the Covid-19 pandemic, 10 member States derogated and half of them indicated which articles of the Convention would be at risk as a result of the measures adopted to respond to the pandemic. Between the beginning of 2020 and the end of 2023, seven new notices of derogation were submitted to the Secretary General of the Council of Europe regarding circumstances other than the Covid-19 pandemic (including energy crises, war, and natural disasters), and only one of these did not specify the Convention articles that risked being impacted by the derogation. The Treaty Office of the Council of Europe has indicated that the practice of indicating the Convention articles affected and not to specific articles of the Convention, is not objectionable as such. It strongly

<sup>81</sup> Committee of Ministers’ Reply to Parliament, *State of Emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights*.

<sup>82</sup> *Pişkin vop. cit.*, §153.

<sup>83</sup> See, in the context of a notified derogation (in relation to an attempted military coup and other terrorist acts), *Yüksel Yalçinkaya v. Türkiye*, Application No. 15669/20, Grand Chamber judgment of 26 September 2023, §350.

<sup>84</sup> Resolution 2209 (2018), Parliamentary Assembly of the Council of Europe, *op. cit.*, §19.1.

recommended, however, that member States, for reasons of legal certainty, specify precisely which provisions they intend to derogate from and the extent of the derogation.<sup>85</sup>

49. In relation to substantive requirements, Article 15 states that derogation is permitted in two sets of circumstances: in time of war or other public emergency threatening the life of the nation. A derogation under the Convention is not contingent on the declaration of a state of emergency or a similar exceptional legal regime.<sup>86</sup> Member States are afforded a wide margin of appreciation to determine whether a public emergency threatening the life of the nation exists and whether and to what extent a derogation is needed.<sup>87</sup> Derogations are, however, ~~subject to the discretion of the~~ **subject to the Co member States do not enjoy unlimited discretion,**<sup>88</sup> nor can they ignore the consequences that the crisis-response measures will have on individuals.<sup>89</sup> In addition, no derogation is permitted from certain provisions of the Convention and its protocols: the right to life under Article 2 (except in respect of deaths resulting from lawful acts of war); the prohibition on torture and inhuman and degrading treatment and punishment under Article 3; the prohibition of slavery and servitude under Article 4 (but not the prohibition on forced or compulsory labour under Article 4(2)); the prohibition on punishment without law under Article 7; the abolition of the death penalty in time of peace (Protocol No. 6, Article 1); the right not to be tried or punished twice (*ne bis in idem*) (Protocol No. 7, Article 4); and the abolition of the death penalty in all circumstances (Protocol No. 13, Article 1).

50. The measures covered by the derogation must not go beyond the extent strictly required by the exigencies of the situation,<sup>90</sup> and the derogation must be necessary and a genuine and proportionate response to an emergency.<sup>91</sup> When assessing the validity of a derogation, the Court takes into account factors such as the nature of the rights affected by the derogation, and the circumstances leading to, and the duration of, the emergency situation.<sup>92</sup> The Venice Commission has highlighted that the predominant objective of the right of derogation must be the restoration of a state of normalcy where full respect for human rights can again be secured.<sup>93</sup> ~~It has also been noted that the requirement by the exigencies of the situation' applies to~~ **derogation.**<sup>94</sup>

<sup>85</sup> *Memorandum on COVID-19 – Derogations under Article 15 of the European Convention on Human Rights*, JJ011/2020 AG/gd, 16 March 2020.

<sup>86</sup> The International Covenant on Civil and Political Rights, on the other hand, does require official proclamation of a public emergency threatening the life of the nation – see article 4(1).

<sup>87</sup> See, in the context of a notified derogation (in relation to a terrorist threat and violent civil disturbances), *Ireland v. the United Kingdom*, Application No. 5310/71, judgment of 18 January 1978, §207.

<sup>88</sup> *A. & others v. United Kingdom*, op. cit., §173.

<sup>89</sup> *Yüksel Yalçinkaya v. Türkiye*, op. cit., §350; CDL-AD(2020)014, op. cit., 19 June 2020, §9.

<sup>90</sup> *Yüksel Yalçinkaya v. Türkiye*, op. cit., §347.

<sup>91</sup> *Brannigan and McBride v. the United Kingdom*, Applications Nos. 14553/89 and 14554/89, judgment of 26 May 1993, §49-51.

<sup>92</sup> *Brannigan and McBride v. the United Kingdom*, op. cit., §43.

<sup>93</sup> CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, §33.

<sup>94</sup> CDL-PL(2020)003, Compilation of Venice Commission Opinions and Reports on States of Emergency, 16 April 2020.

*IX.2. Member States should clarify and, as appropriate, codify their national procedure in relation to derogations from the European Convention on Human Rights.*

51. At the time of the Covid-19 pandemic, very few member States had an established practice for supporting the decision-making process in relation to derogations.<sup>95</sup> Several of them, including some which had derogated during the Covid-19 pandemic and some which had not, explained that the absence of a procedure establishing responsibility and criteria for deciding whether to derogate had prevented them from acting or acting quickly. Having an established procedure would enhance respect for the principle of legal certainty, by making the conditions and criteria for derogation at national level more foreseeable. Such a procedure would ensure that member States are able, where necessary, to make a derogation under Article 15 of the European Convention on Human Rights. It would also strengthen coordination at national level, ensuring that those responsible for taking action are prepared to do so efficiently. Member States are therefore encouraged to review and clarify and, as appropriate, codify their national procedure, or to establish one if none exists, and to base decision-making in relation to derogations on a thorough human rights impact assessment of the emergency measures that are considered potentially to risk non-compliance with rights and therefore to warrant a derogation.<sup>96</sup>

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<sup>95</sup> Report of the Steering Committee on Human Rights (CDDH) on the European Convention on Human Rights in situations of crisis, December 2022.

<sup>96</sup> See §16-17 of the present Explanatory Memorandum.